87-1982

NUMBER _____
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WILLIE HOWARD AVERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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WILLIE HOWARD AVERY

QUESTIONS PRESENTED FOR REVIEW

1) Was Petitioner denied effective assistance of counsel because his trial counsel introduced his 10 year old prior conviction for an identical offense as the one charged and all parties had agreed prior to trial that the prior should not come in?

2) When an appellate court finds that trial counsels allowing of a prior conviction to be introduced for an offense identical to the one a defendant is on trial mandate reversal, or at least remand to the trial court for a finding regarding prejudice?

3) What is the appropriate standard to be used in applying the "reasonable probability of a different result" standard set forth in Strickland v. Washington 466 U.S. 668 104 S. Ct. 2052, 80 L.Ed. 2d. 674.

4) Whether the United States Court of appeals for the Ninth Circuit erred by allowing statements of an alleged co-conspirator to be admitted at trial.

PARTIES TO THE PROCEEDING

There is no other party to this action other than those set forth on the caption of this Petition. James Johnson, originally named as a co-defendant, pled guilty prior to trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Petitioner, WILLIE HOWARD AVERY, respectfully requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit, San Francisco, California [Docket No. 86-1181] affirming Petitioner's conviction in the United States District court for the Eastern District of California, Fresno, California and the order denying the petition for rehiring filed March 28, 1988.

OPINION BELOW

A copy of the opinion below from the United States Court of Appeals for the Ninth Circuit, No. 86-1181 dated January 7, 1988 is attached as Appendix I. A copy of the Court of Appeal's Order denying the Petitioner's Petition for Rehearing dated March 28, 1988 is attached as Appendix II.

STATEMENT OF JURISDICTION

On January 7, 1988, the United States Court of Appeals for the Ninth Circuit in Case No. 86-1181 (Appendix I) affirmed the convictions of the Petitioner in the United States District Court for the Eastern District of California, Fresno, California.

The Petitioner filed a Petition for Rehearing on January 21, 1988. On March 28, 1988, the Court of Appeals entered an Order (Appendix II) denying Appellant's Petition for Rehearing and suggestion for rehearing in banc.

The Petitioner received notice of the denial of his Petition for Rehearing on April 1, 1988

Jurisdiction in the Court is invoked under Title 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION

United States Constitution, Amendment V:

"No person shall ... be deprived of life, liberty, or property, without due process of law ..."

STATEMENT OF THE CASE

Jurisdiction of the District Court

Jurisdiction of the District Court is predicated upon the allegation that the Petitioner violated Title 21 USC 846 and 841 (a)(1) conspiracy; three counts of 21 USC 841(a)(1) and 18 USC 2, distribution and aiding and abetting distribution of a controlled substance, one count of violation of 21 USC 841(a)(1), distribution of a controlled substance and one count of 21 USC 846 and 841(a)(1), attempted possession with intent to distribute a controlled substance. Petitioner was also charged by information pursuant to 21 USC section 841(b)(1)(B) and 85 with a prior conviction relating to indictment number CR F-86-007-REC.

Statement of Prior Proceeding

This case was tried before a jury with the Honorable Robert E. Coyle, United States District Judge, Eastern District of California, presiding.

The Petitioner was found guilty of all counts within which he was named. He was sentenced to serve a term of 15 years imprisonment on Count One, and 10 years on Counts 2, 3, and 5. The Petitioner was convicted on May 22, 1986 and was sentenced on July 7, 1986.

STATEMENT OF THE FACTS

In October 1985, an informant of the Fresno City Police Department, Narcotics Division, made arrangements with James Johnson (Petitioner's co-defendant) to purchase one eighth of an ounce of cocaine. Johnson agreed to meet the informant on October 15, 1985, at a used car lot located in Fresno, California where Johnson was working at the time.

At approximately 11:00 a.m. Fuston went to the used car lot accompanied by Ester Smith, an undercover police officer. Johnson indicated that he would only deal with Fuston, that he had to make a call to arrange for the cocaine, and asked Fuston to return at 5:00 p.m. Fuston and Smith returned to the car lot at 5:00 p.m. At the car lot, Fuston and Johnson got into Johnson's car, and Johnson told Fuston that he was going to meet "his connection." Johnson then dropped Fuston off at a Bank of America parking lot, told her to wait, and drove to the Miracle Hand Car Wash owned by Petitioner.

At the car wash, Johnson left his car and met with Mr. Avery. They spoke for approximately five minutes and Johnson left in his automobile. He picked up Fuston, told her the price and to come back at 6:00 p.m.

Fuston returned to the car lot as instructed at 6:00 p.m. She and Johnson then got into his automobile and drove to the same bank parking lot where she was told to wait. She gave the money to Johnson who then drove back to the Miracle Hand Car Wash. Johnson parked at the car wash, where Avery joined him in his car. He removed an unidentified object from his left pocket, handed it to Johnson, and received something in return. Avery then left Johnson's car, and

Johnson went back to the bank parking lot where he picked up Fuston and handed her a zip-lock baggy containing cocaine.

On October 17, 1985, Fuston again contacted Johnson to purchase cocaine. Johnson picked her up in his car and they went to his mother's house. Fuston asked for an eighth of an ounce of cocaine, and showed Johnson the money. Johnson then said that he would have to pick up the cocaine. He made a phone call, and they left. Johnson told Fuston to get out of his car, saying that his "connection" did not want to meet with anyone.

Johnson then drove to Avery's car wash and was observed to walk toward the office. Avery went to his car and retrieved a briefcase. He took the briefcase into the office and returned to Johnson's car carrying a manila envelope. He got into Johnson's car, remained for 30 to 45 seconds, and then left empty-handed.

Johnson then left the car wash and picked up Fuston. The manila envelope was between the seats in the car, and inside the envelope was the cocaine she had ordered. Following an unsuccessful effort to purchase cocaine from Johnson on October 23, 1985, Fuston made another attempt to purchase narcotics on November 15, 1985. Fuston took Sonia Arriaga, an undercover police officer, to meet Johnson at his house. She was introduced to him as "Chris" and she told him that she was interested in purchasing cocaine. Following a phone call, Johnson told Officer Arriaga that they would have to pick up the cocaine from his "connection."

Johnson directed Officer Arriaga to drive to the defendant's car wash. When they arrived at the car wash, Johnson informed her that it was "good stuff" and the price would be $350.00. She gave him the money, and he left the car and walked toward the car wash. He was gone for approximately five minutes and upon returning, he handed her a baggy containing cocaine. Avery was not at the car wash.

On November 26, 1985, Officer Arriaga again contacted Johnson for the purpose of buying cocaine. She contacted him by telephone and was instructed to come to his house at 11:30 a.m. When she arrived, Johnson told officer Arriaga that they were going to "purchase cocaine but they would have to pick it up."

After two phone calls by Johnson, they left Johnson's house and drove directly to the defendant's residence. Officer Arriaga parked at

the curb and gave the money to Johnson who left the car. Johnson and Avery were observed to go into the house and return approximately ten minutes later. Avery was then introduced to the officer. Avery and Johnson then conferred behind the car for approximately ten seconds and Avery left.

Johnson then got back in the car, stating "He doesn't want to do it in front of the house." He further told her that "this was the guy that he had been obtaining the cocaine from" and instructed her to be at his house at 3:45 p.m.

Officer Arriaga returned as instructed and Johnson made another phone call stating "yeah, she's here. Call me when you get to a pay phone." At approximately 3:00 p.m., surveilling officers had observed the defendant leave his residence in a Mercedes. He drove to a market located at Maple and church Streets and made a phone call, and then drove towards Johnson's house.

After Johnson's phone call, Officer Arriaga heard the phone ring at Johnson's house, and he answered it. She heard him say "meet you at the corner." Officer Arriaga and Johnson then left the house and Johnson directed her to drive to the corner of Hamilton and sierra vista. When they arrived at that location, she gave him $360.00 and he left the car.

Johnson was observed by surveilling officers to go around the corner and meet with the Defendant. Johnson entered Avery's car, staying there for less than a minute. He then returned and gave officer Arriaga a baggy containing cocaine, saying it was "good stuff."

At trial, Johnson testified as a defense witness. As to the purchase of cocaine on October 15, 1985, Johnson said that he obtained the cocaine by calling a beeper number. He stated that he then received the narcotics from a Blazer automobile which drove up in front of Harvey Hime's Used Cars and delivered the package. Johnson also testified that his contact with Avery on that day related solely to a debt owed to him to Avery.

As to the October 17, 1985 transaction, Johnson stated that he had picked up the cocaine from a house on Los Angeles Street 30 to 45 minutes before meeting Fuston. He stated that he simply drove up and purchased the drugs from people on the street. He testified again

that his contact with Avery on that day related solely to the matter of his debt to Avery.

Johnson also testified regarding the November 15, 1985 sale. He stated that he received the cocaine on that occasion by calling the beeper number and that it was delivered a few blocks from his house. He said that he paid the supplier with a ring that he was wearing.

He testified that the phone calls which Officer Arriaga heard were not actual phone calls were simply simulated because he wanted Officer Arriaga to believe that he had to go some place else to get the cocaine. He stated that he had instructed Officer Arriaga to drive by the car wash only to see if she would look over there. He thought that the police had the defendant under surveillance, and he wanted to leave the illusion that he might be getting his cocaine at the car wash. He further testified that he always suspected that Officer Arriaga was a police officer. He stated that he simply talked with Howard Avery at the car wash, then walked back to the car and gave Officer Arriaga the cocaine.

Johnson also testified about the November 26, 1985 sale to Officer Arriaga. He stated this his phone call to the car wash and his phone call to Avery's house were not actual conversations. He said he did this in order to make Officer Arriaga feel that he was setting something up.

He testified that the reason he went to Avery's house was to show the defendant and Officer Arriaga that he had some class and to borrow $200 from Avery. He explained that all later contact on that day with Avery related to this $200 loan, not to narcotics. He testified further that he had arranged for the cocaine not through Avery, but by use of a beeper telephone number.

The defendant also testified. He stated that he was the owner and operator of the Miracle Hand Car Wash and that in 1972, while he was in another business, he got involved with drugs. He testified that at first he used marihuana, then alcohol, and then cocaine.He further testified that he had been addicted to cocaine. He also admitted to a 1975 narcotics conviction and testified in accord with Johnson concerning their contacts on October 15,17 and November 26, 1985.

REASONS FOR GRANTING THIS WRIT

Prior to Petitioner's testimony, his wife was called to the stand by defense counsel. On direct examination Avery's wife portrayed defendant as a hard-working businessman who was, at that time, opposed to drugs.

After direct examination was over, the U.S. Attorney approached the bench. He asked for and received permission to impeach Avery's wife with the fact that she had signed a false petition for mitigation of forfeiture under penalty of perjury. The false material related to the fact that Avery's wife had been convicted of a drug related felony with the defendant in 1975.

The defense attorney was unaware that the petition was false and of the fact that defendant's wife had been convicted of a felony, even though the petition was prepared by his office.

After his attorney found out about the priors he recalled Avery's wife and brought out both the defendant's wife's prior conviction as well as the defendants. Prior to this time all parties agreed Petitioner's prior would not come in.

Petitioner asserts that the decision rendered in this matter by the Court of Appeals is in conflict with the United States Supreme Court decision in the case of Strickland v. Washington 466 U.S. 668, 685-686, 104 s. ct. 2052, 80 L Ed. 2d 674 (1984). In this case, trail counsel for the Petitioner was ineffective in that he, of his own accord and without any tactical justification, brought out the Petitioner's prior conviction for identical offenses which had occurred some ten (10) years prior to the instant case. It is obvious from the record that counsel's actions were the result of his ignorance and for no other reason. The result of this mistake on trial counsel's part was that the Petitioner was exposed to the extreme prejudicial effect of not only having the prior conviction admitted into evidence before the jury, but also a myriad of amazing facts surrounding said prior conviction. Such a factual circumstance is contrary to the mandate of the Fifth Amendment requirement of effective and competent representation which has to be afforded by trial counsel. Such a failure is violative of those Due Process considerations which Strickland, supra holds as fundamental.

Furthermore, the decision of the Ninth Circuit Court of Appeals appears to conflict with the decision of the Second Circuit case of U.S. v. Pagen (L.A. Conn. 1983) 726 F.2d 24 in that the Second Circuit holds that erroneous admission of prior ordinarily warrants the granting of a new trial.

Also, the result in this case illustrates the problem of defining the "reasonable probability of a different result" standard set forth by this court in Strickland v. Washington (supra).

Lastly, the decision rendered by the Ninth Circuit Court of Appeals with regard to the conspiracy conviction of Petitioner is in conflict with the Seventh Circuit (United States v. Marcilias, ((1978) 580 F2d 1301, 1307) and the First circuit (United states v. Izzi (1980) 613 F2d 1205, cert. denied. 100 S.Ct 2162, 446 U.S. 940, 64 L.Ed 2d 793). In the case at hand there was never any proof adduced at trial that there was any agreement between Petitioner and his codefendant to conspire to distribute cocaine. The mere fact that Petitioner agreed to sell what someone elswe agreed to buy is not sufficient for a conspiracy.

CONCLUSION

Through this petition, the Petitioner prays that the Supreme Court will take notice of the denial of due process of law as afforded by the Fifth Amendment to the United States Constitution because of the ineffective and incompetent assistance of trial counsel, the result of which was the admission of said prior conviction, and the lack of evidence of any sort of an agreement between the Petitioner and his codefendant which would legally constitute the essential elements of a criminal conspiracy.

The Fifth Amendment protects the concept of fundamental fairness. The Petitioner believes that this concept of due process is denied when the incompetence of trial counsel results in the admission of a highly prejudicial and otherwise inadmissible prior conviction.

It is therefor prayed that this Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Dated: May 30, 1988

Respectfully submitted.

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Attorneys for Petitioner
WILLIE HOWARD AVERY

NUMBER _____
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CERTIFICATE OF SERVICE

RICHARD G. CENCI, Attorney at Law, certifies that pursuant to Rule 28.2 of this court, he served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth circuit on counsel for respondent, respectively, by depositing said petition, and copies thereof, in the United States mail at Fresno, California on May 31, 1988, first class, postage prepaid within the time allowed for filing.

Services was made upon counsel for respondent at the following address: Solicitor General, Department of Justice, Washington, D.C. 20530. United States Attorney, Eastern District of California, 1130 "O" Street, Fresno, California & the U.S. District Court for the Eastern District of California.

All parties required to be served have been served. I certify under penalty of perjury that the foregoing is true and correct.

Dated this 31st day of May, 1988.

Richard G. Cenci

RICHARD G. CENCI
Attorney for Petitioner
WILLIE HOWARD AVERY

APPENDIX I

FILED Jan 7, 1988
Cathy A Catterson, Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. WILLIE HOWARD AVERY, Defendant-Appellant.	No. 86-1181 DC No. CR-F-86-007-REC MEMORANDUM*

Appeal from the Untied States District Court
for the Eastern District of California
Robert E. Doyle, District Judge, Presiding

Argued and Submitted September 15, 1987

Before: CHAMBERS and CANBY, Circuit Judges, and
KING,** District Judge.

Willie Howard Avery appeals from convictions for (1) conspiracy to distribute cocaine; and (2) distribution and aiding and abetting the distribution of cocaine. We affirm.

FACTS

In October 1985, Patricia Fuston, and undercover informant, arranged to buy cocaine from James Johnson, appellant Avery's co-defendant. [1/]Johnson told Fuston he was "going to meet his connection" and then drove to a car wash owned by Avery. There he

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The Honorable Samuel King, Senior United Sates District Judge, District of Hawaii, sitting by designation.

1/Johnson pleaded guilty before Avery's trial.

spoke with appellant and shortly thereafter told Fuston the price of the cocaine and that it would be ready at 6:00 pm. When Fuston and Johnson met at 6:00 pm, she gave him money. Johnson then met Avery at the car wash. While sitting in a car they exchanged objects. Johnson then delivered to Fuston a baggy containing cocaine.

On October 17, 1985, Fuston told Johnson she wanted to buy cocaine and showed him money. Johnson said he would get the cocaine, but that his connection did not want to meet with anyone. Johnson again met Avery at his car wash where appellant left a manila envelope in Johnson's car. Johnson then delivered to Fuston a manila envelope with cocaine inside.

On October 23, 1985, Johnson and Officer Arriaga, an undercover police officer, drove to Avery's car wash. Johnson left the car and returned with a baggy of cocaine.

On November 26, 1985, Officer Arriaga and Johnson met at Avery's house but Johnson told Arriaga, "he doesn't want to do it in front of the house" and that this was his cocaine source. Later, after meeting Avery, Johnson delivered cocaine to Arriaga.

At trial, appellant's wife, Mrs. Avery, testified for the defense. At the completion of her direct examination, the prosecutor sought permission to impeach Mrs. Avery through the introduction of evidence of a 1976 narcotics violation. Defense counsel was not aware of the conviction, but after satisfying himself that it existed, elected to reopen direct examination. Defense counsel then elicited lengthy testimony that Mrs. avery and appellant Avery had used cocaine, that appellant had been addicted and that they both had been convicted of felony drug charges involving cocaine.

DISCUSSION

Avery first contends the district court erred by admitting his prior drug conviction without weighing its probative value against the prejudicial effect as required under Fed. R. evid. 609(a).

The admissibility of prior convictions is discretionary and reviewed only for a abuse of discretion. United States v. Field, 625 F. 2d 862, 871 (9th Cir. 1980). Accord United States v. Givens, 767 F.2d 574, 577 (9th Cir. 1985).

While the record does not reflect that the district court engaged in a formal weighing and balancing as to either appellant's or Mrs. Avery's prior convictions, we cannot say on these facts district court abused its discretion in admitting them.

Unlike the usual case, here, defense counsel introduced both the prior convictions. At the close of Mrs. Avery's direct examination, the prosecutor sought permission to introduce Mrs. Avery's prior. Upon reopening direct examination, defense counsel elicited from Mrs. Avery not only her own prior conviction but also appellant's. Prior to embarking on this course, counsel made no requests to exclude the priors or bring an in limine motion. Although counsel did state "we ought to have that (testimony of prior drug problems) out to the presence of the jury," it was he who pursued a line of questioning which presented to the jury testimony of prior drug problems.

Because defense counsel introduced the priors, we do not find the district court abused its discretion in either admitting them or in failing to engage in a formal weighing and balancing on the record.

Avery argues trial counsel's handling of the prior convictions constituted ineffective assistance of counsel. To succeed on an ineffective assistance of counsel claim, avery must show: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To demonstrate prejudice Avery "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Assuming arguendo, counsel's failure to know of Mrs. Avery's prior conviction and his decision to elicit the details and surrounding circumstances of both convictions fell below an objective standard of reasonableness, we do not find that Avery was prejudiced such that the trial result would have been different but for counsel's errors. Without the evidence of the prior convictions, there was sufficient evidence that Avery was engaged in a conspiracy with Johnson to distribute cocaine and aided and abetted johnson in its distributions. Avery was observed repeatedly in Johnson's company engaged in suspicious transactions after which Johnson emerged with cocaine to sell. Avery has not shown that he received ineffective assistance of

counsel because he fails to demonstrate prejudice such that the trial result would have been different but for counsel's handling of the priors.

Avery also contends the admission of co-conspirator Johnson's statements was error because there was insufficient evidence of a conspiracy.

"Before admitting a statement of a co-conspirator into evidence against a defendant, the court must have independent evidence of the existence of the conspiracy and of the defendant's connection to it, and must conclude that the statement was made both during and in furtherance of the conspiracy." United States v. Layton, 720 F. 2d 548, 555 (9th cir. 1983), cert. denied, 465 U.S. 1069 (1984).

"The existence of a conspiracy may be proved by circumstantial evidence that defendants acted together for a common illegal goal." United States v. Penagos, 823 F. 2d 346, 348 (9th cir. 1987).

There was sufficient evidence of a conspiracy to permit the introduction of Johnson's statements. There was considerable evidence that Avery was Johnson's source of cocaine and that Johnson acted as the middleman between Avery as seller and the persons working undercover as ultimate purchasers. The evidence does not suggest that Johnson was purchasing and selling for his own consumption only. Instead, the evidence demonstrates that Johnson contacted Avery for the cocaine which he then sold to a third party. This independent evidence more than sufficiently raises the inference that Avery knew Johnson was his go-between in delivering the cocaine.

Finally, Avery contends the district court erred in denying his motion to acquit. There was more than sufficient evidence to allow a reasonable trier of fact to find that the evidence established guilt beyond a reasonable doubt. See United States v. Vales-Valencia, 811 F.2d 1232, 1239 (9th Car. 1987).

The convictions are AFFIRMED.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED Mar 28, 1988
Cathy A. Catetrson, Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. WILLIE HOWARD AVERY, Defendant-Appellant.	CA No. 86-1181 DC No. CR-F-86-007-REC

BEFORE: CHAMBERS AND CANBY, CIRCUIT JUDGES,
AND KING,* DISTRICT JUDGE.

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Samuel King, Senior United Sates District Judge, District of Hawaii, sitting by designation.